COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

CASE NO. 2013-SC-000828-TG
(On Transfer from the Kentucky Court of Appeals
2013-CA-002088-MR)

HON. ANN BAILEY SMITH,
CHIEF JUDGE,
JEFFERSON DISTRICT COURT — **APPELLANT**

v.

Appeal from Jefferson Circuit Court, Division Nine
Hon. Judith E. McDonald-Burkman, Judge
No. 13-CI-003689

COMMONWEALTH OF KENTUCKY
EX REL. MICHAEL J. O'CONNELL
And
TIMOTHY HIGGINS — **APPELLEE**

Brief for *Amici Curiae*:

Traumatic Brain Injury Trust Fund; Kentucky Association of Sexual Assault Programs; Kentucky Department of Public Advocacy; Kentucky Sheriff's Association; Kentucky Chapter of the Fraternal Order of Police Deputy Sheriff's Lodge 25; Kentucky County Judge/Executive Association

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I certify that a copy of this brief was mailed on July 1, 2014 to: Hon. Judith McDonald-Burkman, Judge, Jefferson Circuit Court, Division 9, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Ky. 40202; Counsel for Appellant Hon. Ann Bailey Smith, Chief Judge, Jefferson District Court, Division 2, Hon. Virginia Hamilton Snell, Hon. Deborah H. Patterson, and Hon. Sara Veeneman, Wyatt, Tarrant & Combs, LLP, 2800 PNC Plaza, 500 West Jefferson Street, Louisville, Ky. 40202; Counsel for the Appellee Hon. Michael J. O'Connell, Hon. David Sexton, Assistant County Attorney, Jefferson County Attorney's Office, Fiscal Court Building., 531 Court Place, Suite 900, Louisville, Ky. 40202; Counsel for Appellee Timothy Higgins, Hon. J. Bruce Miller, 325 West Main Street, 20th Floor, Louisville, Ky., 40202; Special Counsel for *Amici Curiae* Kentucky County Attorneys Association Inc., Hon. Ian G. Sonego, 1001 Center Street, Suite 205, Bowling Green, Ky. 42101-2191.

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INTRODUCTION

The primary issue in this case is whether a participant who successfully completes a county attorney-operated traffic safety program under KRS 186.574(6) is subject to payment of court costs as a matter of law, or alternatively – if the law is unclear or ambiguous on this issue – whether the county attorney can waive court costs on his own motion without judicial concurrence.

All signees to this *Amicus* brief are participants in the court cost distribution fund established by the General Assembly in KRS 42.320, who receive disbursements from the fund of a certain percentage of court costs collected under KRS 23A.205(1) and KRS 24A.175(1), or are organizations dedicated to the support of the court costs recipients. All of the below *Amici* and/or the organizations for which they here appear in support have lost or will stand to lose funding in the form of court costs disbursements in the event that KRS 186.574(6) is interpreted to exclude the imposition of court costs from county attorney-operated traffic safety programs.

The Traumatic Brain Injury Trust Fund was created by the General Assembly in 1998 to provide services to all individuals with acquired and traumatic brain injuries across the Commonwealth regardless of age or income. The Trust Fund derives its funding from five and one-half percent (5.5%) of collected court costs, and from KRS 189A.050, which specifies that the Trust Fund shall get eight percent (8%) of DUI service fees after the first fifty dollars.

The Kentucky Association of Sexual Assault Programs (KASAP) is the coalition of the thirteen rape crisis centers across the state and provides counseling, hospital advocacy and legal advocacy to persons affected by sexual violence. Financial support for services for clients of KASAP are derived in part through the Crime Victim's Compensation Fund which receives three and four/tenths percent (3.4%) of collected court courts.

The Kentucky Department of Public Advocacy (DPA) was created to represent needy persons charged with crimes who are too poor to hire an attorney, in furtherance of the constitutional right to counsel under the United States and Kentucky Constitutions. The DPA receives three and one-half percent (3.5%) of collected court costs.

The Kentucky Chapter of the Fraternal Order of Police Deputy Sheriff's Lodge 25, of Jefferson County, Kentucky, is the voice of those who dedicate their lives to protecting and serving their community of Jefferson County, Kentucky. Its interest is in supporting the Jefferson County Sheriff's Office and its receipt of disbursements under the court costs statute. It joins this brief in support of county sheriff's offices, each of which receives ten and one-tenth percent (10.1%) of court costs collected from its home county.

The Kentucky Sheriff's Association encourages social, charitable, and educational activities among the Sheriffs of this Commonwealth, and works to resist the constant efforts to curtail the efforts of law enforcement officers to preserve law and order within the Commonwealth, and do any and all things to promote the enforcement of law and order. It joins this brief in support of county sheriff's offices, each of which receives ten and one-tenth percent (10.1%) of court costs collected from its home county.

The Kentucky County Judge/Executive Association is an association of county government assembled for the purpose of serving and representing county judge/executives and their respective counties. In addition to supporting the interests of their county sheriffs, they are also interested in supporting the fiscal courts of the counties, the county treasurers of which receive five and one-half percent (5.5%) of court costs from the in the county from which the costs are collected for the purposes of defraying the costs of operation of the county jail and the transportation of prisoners."

STATEMENT CONCERNING ORAL ARGUMENT

Amici would welcome oral argument in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Jefferson District Court, Division 2, Hon. Ann Bailey Smith, in the case of Commonwealth v. Higgins, No. 13-T-015915, issued an Opinion and Order finding that (1) the Jefferson County Attorney-operated traffic safety "Drive Safe Louisville" program was a diversion program, (2) a dismissal of a traffic offense due to completion of the program required judicial concurrence, (3) court costs are rightfully assessed for participants who successfully complete the program, and (4) the county attorney lacks legal standing to oppose the imposition of court costs.

Upon petition for writ of prohibition and/or mandamus, the Jefferson Circuit Court, Division 9, Hon. Judge Judith E. McDonald-Burkman, in case no. 13-CI-3689, issued an Order granting the writ, instructing the District Court to dismiss the citations of Drive Safe Louisville participants upon successful completion of the program, upon motion of the County Attorney, without payment of court costs.

Upon Appeal of the Circuit Court Order by the Appellant District Court Judge Ann Bailey Smith to the Kentucky Court of Appeals, and upon grant of the motion to transfer the case to the Kentucky Supreme Court, the Kentucky Supreme Court is now considering case no. 2013-SC-000828.

Amici hereby request that this honorable Supreme Court vacate the Order of the Jefferson Circuit Court and reinstate the findings of facts and conclusions of law which – were well-reasoned and well-grounded in Kentucky Constitutional and statutory law – contained within the Jefferson District Court's Opinion and Order.

ARGUMENT

I. The County Attorney-Operated Traffic Safety Program as Enacted in KRS 186.574(6) and as Applied in the "Drive Safe Louisville" Program Violates the Kentucky Constitution § 2 Prohibition Against the Exercise of Arbitrary Power and Can Lead to other Anomalous and Unconstitutional Results.

Kentucky Constitution § 2 provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The county attorney-operated traffic safety program contained in KRS 186.574(6), as enacted and as applied in the "Drive Safe Louisville" (DSL) program which is the subject of this litigation, is an exercise of absolute and arbitrary power.

KRS 186.574(6) provides only that "a county attorney may operate a traffic safety program for traffic offenders prior to the adjudication of the offense." The term "adjudication," commonly understood to mean the final judgment and/or sentencing in a case, surely contemplates that the case for which the traffic safety program is offered is a case already pending in court, including all the requisites of first appearance, arraignment, and presentment to the alleged offender of all available constitutional and statutory rights. Presumably, the statute intends for a person charged with a traffic offense to make a knowing and voluntary decision whether to enter into the traffic safety program, or whether to continue along in the conventional criminal justice system.

However, DSL goes far beyond what is contemplated by the statute, and vests the Jefferson County Attorney with absolute and arbitrary power over the participants, in violation of other valuable constitutional and statutory rights.

A. DSL Operates Without Judicial Oversight

Without addressing the issue of whether DSL is or is not a "diversion" program (an issue hotly contested in proceedings below), DSL describes itself as an "alternative" to the court system. Clearly, DSL's intent is to involve the judicial branch as little as possible in the process, and as a result, avoid the need for an assessment of court costs.

According to a letter from Jefferson County Attorney Mike O'Connell, Attachment 1 to the Jefferson District Court's Opinion and Order, the traffic safety program offered under DSL has the following characteristics:

- The traffic safety program is an "*alternative to court* for certain citations." [Emphasis added.]

- Persons cited for traffic violations "*may be eligible to participate in this program instead of appearing in court.*" [Emphasis in original.]

- A participant who qualifies and completes the program will have his or her citation dismissed, avoid points being assessed on his or her driver's license, avoid having a violation appear on his or her driving record, and avoid having "statutory fines and other expenses" being assessed.

- A person who wishes to apply or participate can either go to the DSL website, or call a toll-free number, thereby completely avoiding having to go to court.

According to the DSL website (www.drivesafelouisville.com) home page (Attachment 2 to the Jefferson District Court's Opinion and Order), drivers who "complete the program" before the scheduled court date would have the citation dismissed. From the "FAQ" tab on the website, number five indicates that "[i]n order for an offender to take this program, he must first be approved by the County Attorney's Office in the same county where you received your traffic citation." Thereafter, there are instructions to provide to the county attorney's office information relating to any charge for received for not having documentation, such as no insurance, no registration, and expired plates. However, *nowhere* on the FAQ section of the tab is there a list of which offenses are or are not included for participation in the traffic safety program.

In other words, the County Attorney retains the absolute and sole discretion over who is approved for DSL, what charges are subject to DSL and what if anything a person must do. If a participant is approved, payment received, and the on-line quiz passed before the first court date, the participant never appears before the district court, whether or not the district court has to approve the ultimate dismissal. Because names and addresses of participants, and the offenses diverted under the program do not have to be recorded, there is potential for abuse of valuable constitutional and statutory rights.

B. The Criteria for Acceptance into the DSL Program is Undefined and Subject Only to the Discretion of the County Authority, Who Therefore has Absolute and Arbitrary Authority to Choose Who Participates and Who Does Not.

Under KRS 186.574(6)(c)(2), the *only* information that has to be reported to the Prosecutors Advisory Council is the fee charged for the program and the total number of traffic offenders diverted into a county attorney-operated traffic safety program for the preceding fiscal year categorized by traffic offense. The county attorney is not required to list which offenses were diverted under the traffic safety program, *the* identities of the persons diverted, or whether multiple persons with identical charges are treated alike.

The county attorney, therefore, is the sole arbiter of who qualifies for acceptance into the program, and which offenses will be diverted. Without the check and balance of judiciary oversight throughout the process, the public is left to assume the county attorney will treat everyone fairly and equally under the system.

At the outset, all of the *Amici Curiae* signees want to stress that they do assume that in the vast majority of cases, law enforcement carries out their duties in accordance with the laws and constitutions, whether the duties are performed by the sheriff's office, the Kentucky State Police, local police of cities and municipalities, university campus police, or other law enforcement entities. Nevertheless, it must also be contemplated that *not every* peace officer or county attorney in the state will perform his job fairly and constitutionally, and our criminal justice system must therefore have in place appropriate checks and balances upon the government's institutions.

> Ours is a government of law. Under its authority and through its agencies alone wrongs must be redressed and rights protected. Unless this were so, there would be no assurances of peace or quiet for the law-abiding and order-loving who constitute so large a part of our people. The life and the property of the citizen would be insecure, and the lawless, reckless, and violent would be at liberty to exercise at will their disregard of civil authority. *Franks v. Smith*, 134 S.W. 484 (Ky. App. 1911).

Under the DSL program, there is no check and balance through judicial oversight to prevent the following possible occurrences. Theoretically, a peace officer could decide to racially profile motorists in violation of the Kentucky Racial Profiling Act, KRS 15A.195; or a county attorney could refuse to offer the program to those persons who

opposed him in the last election, or to anyone, for any number of arbitrary, yet unreviewable, reasons, in violation of the Equal Protection Clause of the United States.

The lack of any oversight by anyone other than the county attorney vests absolute and arbitrary power. There is not even a check and balance *within* the executive branch, as the Prosecutor's Advisory Council does not get access to information about who participates, or what charges are being diverted into the traffic safety program.

C. KRS 186.574(6) Places Too Few Limits on What Crimes can be Diverted into the Traffic Safety Program, and Thwarts the Sixth Amendment Right to Counsel in the Process.

A traffic offense is typically thought of as something like speeding, failing to give a signal when changing lanes, and other minor infractions for which a driver's education program similar to that offered by state traffic school under KRS 186.574 is entirely appropriate. However, KRS 186.574 places few limits on what traffic offenses can be subject to the county attorney-operated traffic safety program; many misdemeanors and felonies can be offered under the program at the absolute and arbitrary discretion of a county attorney without court oversight until time of dismissal.

KRS 186.574(6) excepts DUI's under KRS 189A.010, lack of security covering motor vehicle under KRS 304.39-080, any violation that has a penalty of mandatory revocation or suspension of a driver's license, or any offense if the person did not have a valid driver's license, or whose license was suspended or revoked at the time of the violation. This leaves dozens of "traffic" offenses which carry a criminal penalty – including felonies – as being subject for selection into DSL or any county attorney-operated program. For instance, theft of a motor vehicle registration plate under KRS 189.990(6) or alteration or removal of a vehicle identification number under KRS 186A.305 are felonies which could be diverted under the program. That these offenses are logged into the criminal system as "T" cases, rather than "F" cases, is merely due to a decision made about how to classify such offenses.

The question arises, then, if KRS 186.574(6) can be construed to allow a county attorney to "divert" or offer a traffic safety program for such serious offenses without the offender first having to be arraigned and read his or her rights, with opportunity for counsel, what principles prevent the legislature from enacting a statute which allows a prosecutor to divert *any* crime, traffic or otherwise? Where lies the constitutional dividing line between those cases that are "appropriate" for inclusion in a diversion program, and those that are "too serious" to divert? Even though the court may at the end deny the dismissal upon completion of the program, this does not make up for the executive branch effectively being granted plenary power to arrest, charge, interview and accept an individual into a program, and then approve or disapprove of the individual's performance in the program, all without a reading of rights or appointment of counsel, and before the courts have opportunity to ensure the constitutionality of the arrest.

Moreover, because the statute and DSL are silent about what happens to a participant who enrolls but then fails to complete the program, it is conceivable that admissions made by the participant during the application process could be used against him later should the case be restored to the court's docket for conventional prosecution. County attorneys could require a written "admission" of the offense as a condition of enrollment, which could be used against the participant in the event of a failed diversion.

Such a statute would strike at the heart of the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment guarantee of counsel. By the time counsel is eventually appointed to any case which carries a possibility of incarceration, constitutional rights may have been waived, and the opportunity for counsel to act have been so thwarted as to ensure conviction. A failed participant who now finds himself a defendant in a case where the opportunity to mount a defense no longer exists would surely, in violation of *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), be facing incarceration on facts which have "never been subjected to 'the

crucible of meaningful adversarial testing,'" *citing U.S. v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

D. KRS 186.574 Allows Selective Prosecution and Will Create a Disparate Impact Among Potential Participants in County Attorney-Operated Traffic Safety Programs.

Kentucky's legislature sets the range of penalty for each of its misdemeanors and felonies. Upon conviction, while there will obviously be variances in sentences among individuals, all will be sentenced within that range. Likewise, there can be variances of what constitutes the "standard offer" in each county. One county may impose a "fine only" upon conviction of certain misdemeanors, e.g., possession of marijuana, while another county imposes jail time. However, any penalty imposed anywhere must be within the lower and upper limits of the range of penalty set by the legislature.

There are no upper or lower limits of participation, or any standardization of any "traffic safety program," set by KRS 186.574, and thus, each county attorney is left to choose what any participant must do in order to be diverted or have the charge dismissed. Programs could range from a one or two-day live class session to a five-minute online quiz. The fee can range from a *de minimus* $10 to a comparatively expensive $150, or higher. Nothing prohibits a "sliding scale" which depends upon the seriousness of the offense. After all, what would be a "reasonable" fee in a traffic safety program in which someone charged with a felony gets to get a dismissal with prejudice in district court? More to the point, there is no court oversight or legislated criteria which ensures that a "traffic safety program" actually promotes safety or would have any impact on the reduction of future traffic incidents. Absolutely nothing prevents a program from consisting of no more a fee and a promise to "not do that again."

In short, every county attorney has absolute and arbitrary power to fashion any kind of program that he wants, and place – or not – anybody charged with anything into that program, free from scrutiny until such time as a district judge approves a dismissal of a case involving a participant that has *never* appeared in district court.

Thus, a motorist traveling the Commonwealth can be subjected to the widest variety of potential ramifications for violation of a "traffic offense," all of which depend upon which county in which he or she is traveling. This can lead to a violation of the Equal Protection Clause of the United States Constitution. "In order to make out an equal protection claim on the basis of selective enforcement, a plaintiff must demonstrate that someone similarly situated but for the illegitimate classification used by the government actor was treated differently. *Boone v. Spurgess,* 385 F.3d 923 (6th Cir. 2004), *citing Stemler v. City of Florence,* 126 F.3d 856, 873 (6th Cir.1997). As already shown, a local government acting through the county attorney could selectively enforce the traffic safety program in a way that singles out a specific class of individuals, but which escapes purview of the courts. Again, it is presumed that nearly all of the time, county attorneys and police officers would *not* unconstitutionally discriminate; but there is simply no mechanism within the law to ensure court oversight so that discrimination does not occur.

II. Appellee's Interpretation of KRS 186.574(6) Violates Kentucky's Constitutional Separation of Powers

Kentucky Constitution § 27 provides: "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Kentucky Constitution § 28 provides: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

A. Appellee's Interpretation Infringes Upon Judicial Branch Powers.

Appellant has already briefed how the judicial branches powers are offended by the Appellee's interpretation of the statutes in question, and Amici Curiae agree fully with them. "A court, once having obtained jurisdiction of a cause of action, has, incidental to its constitutional grant of power, inherent power to do all things reasonably

necessary to the administration of justice in the case before it." *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), *quoting Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984). The assessment of a court cost for a case brought before it prior to granting a dismissal is a power inherently held by the courts, and exercised by application of Kentucky Rule of Criminal Procedure 8.04(2), which allows the court to approve a pretrial diversion agreement which includes conditions that could be imposed upon probation, which in turn, can include court costs under KRS 533.030(2)(g).

B. Appellee's Interpretation Infringes Upon Legislative Branch Powers

Of equal concern to *Amici Curiae* is infringement upon powers granted to the Legislative Branch, particularly Kentucky Constitution § 29, which vests the legislative power within the House of Representatives and the Senate, and Kentucky Constitution § 47, and which provides that "[a]ll bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments thereto."

KRS 42.320, which establishes the court cost distribution fund created by the General Assembly in order to "provide a central account into which the court costs collected by all circuit clerks, under KRS 23A.205(1) and 24A.175(1), shall be paid," detailed the particular ways in which Kentucky's legislature intended collected court costs to be distributed. As shown in the Introduction of the brief and in the Motion for Leave to File *Amici Curiae* Brief, many of these disbursements impact the funding mechanism for your *Amici* participants. All of these entities selected for receiving disbursements have duties or functions to perform which arise in some part or connected to the alleged acts of those persons who are charged with violations, misdemeanors or felonies, and which appear in the court system as defendants or other parties:

The Traumatic Brain Injury Trust Fund provides services to persons who have brain injuries, very many of which are victims due to a violation of a traffic law or other law which resulted in an accident. The Sheriff's Office of each county will have arrested, summonsed, or cited many participants charged with violations, misdemeanors or

felonies. It also supplies bailiff and court security services for the courts in each county. In a time of scarce funding, the sheriff's office must choose where best to marshal the office's resources and how best to spend money in law enforcement and investigation efforts. Often, an investigation into other more serious crimes begins with an initial stop pursuant to a traffic violation. The lack of participation of court costs disbursements acts as a disincentive for any sheriff's office to enforce traffic laws, e.g., speeding. The Kentucky Association of Sexual Assault Programs provides counseling, hospital advocacy and legal advocacy to persons affected by sexual violence. The Department of Public Advocacy is appointed to represent the needy defendants in the court systems. County fiscal courts, which fund the jails, must make annual decisions on how much money is available to be allocated to defraying the costs of incarceration and/or transportation of arrestees.

It must be presumed that the General Assembly acted deliberately with regard to what entities participate in the distribution of court costs, and what percentage each entity is to receive. At the time of passage of KRS 186.574(6), which became effective July 12, 2012, KRS 533.262(1) – which acknowledges the Kentucky Supreme Court's pretrial diversion program – was already in place. Kentucky RCr 8.04(2) allows diversion agreements which include conditions "that could be imposed upon probation." As Appellant notes, court costs are routinely imposed upon probation.

Amici Curiae fully agrees with Appellant that the county attorney traffic safety program is a "diversion" program, as demonstrated by KRS 186.574(6)(c)(2)'s use of the very term "diverted." But should this Court find that the county attorney-operated traffic safety program is *not* a diversion program, then the statutes existing at the time of the enactment of KRS 186.574(6) still contemplate the imposition of court costs upon the outcome of successful completion of the county attorney-operated traffic school.

KRS 186.574, which established the state traffic school operated by the Transportation Cabinet, imposed the school as the traffic violator's "penalty in lieu of any

other penalty, except for the payment of court costs." KRS 24A.175 expressly provides that the taxation of costs against a defendant, upon conviction in a case, including persons sentenced to state traffic school as provided under KRS 186.574, shall be mandatory..." While the Appellee tries to distinguish the result of a participant who completes county attorney-operated traffic safety program (dismissal) from the result of a participant in a state traffic school (sentenced to the school in lieu of any other penalty), the result for the two is the same. The program *is* the penalty, and no other punishment normally available under the traffic charge – whether a fine, jail time, or "points" on a license – is assessed. Presumably, KRS 24A.175 uses the language "including persons sentenced to state traffic school" as part of the definition of "conviction" precisely because the outcome for traffic school participants is not what is normally contemplated by the term "conviction."

"The General Assembly is presumed to know the status of the law at the time a statute is enacted. 'It is to be presumed, also, that the legislature is acquainted with the law, that it has knowledge of the state of the law on subjects on which it legislates, and that it is informed of previous legislation and the construction that previous legislation has received.'" *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420 (Ky. App. 2001), *quoting Commonwealth v. Boarman*, 610 S.W.2d 922, 924 (Ky. App. 1980). By not specifically excluding participants in a county attorney-operated traffic safety program from court costs, the legislature's intent must have been that participants pay them.

Therefore, an interpretation of KRS 186.574(6) that county attorneys have discretion to deprive the recipients of their distribution of court costs as outlined above in is to allow an officer in the executive branch to have unfettered, unchecked control over the amounts of money intended to be distributed under the legislature's revenue powers.

III. The Interpretation Urged by the Appellee Unnecessarily Places County Attorneys in Potential Conflicts of Interest.

Appellee urges that traffic safety programs under KRS 186.574(6) are not subject to collection of court costs by a district court despite the fact that there is no legal authorization for the extinguishment of court costs in KRS 186.574.

It is a primary rule of statutory construction that "[a]ny apparent conflict between sections of the same statute should be harmonized if possible so as to give effect to both; and in so doing, the statute should be construed so that no part of it is meaningless or ineffectual." *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999). *See also Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007). A harmonized interpretation of the statutes would allow county attorneys to operate a traffic safety program and collect the reasonable fee allowed by KRS 186.574, but which is also subject to collection of court costs under KRS 24A.175. The statutory construction urged by Appellee unnecessarily ignores the application and plain meaning of KRS 24A.175. Worse, the interpretation urged by Appellee places county attorneys in every county in a potential conflict of interest.

As discussed earlier, 10.1% of each collected court cost is distributed to the county sheriff and 5.5% to the fiscal court on behalf of the jails. Thus, county governments collect a total of sixteen and six-tenths percent (16.6%) from each court cost, and it is in the interest of each county that court costs be collected on each case presented in district court, including those cases which result in a traffic safety diversion for the violator. However, the interpretation of KRS 186.574(6) urged by Appellee would deprive the county governments of this distribution of court costs for every case which the county attorney chooses – in his or her sole discretion without judicial oversight or concurrence – to divert under the traffic safety diversion program.

Yet, the county attorney is in every sense of the word counsel for the county government, and statutorily may not act adversely to the financial interests of the county:

> The county attorney is required to "attend the fiscal court" and "conduct all business touching the rights or interests of the county..." KRS 69.210(1).

> The county attorney "shall give legal advice to the fiscal court or consolidated local government and the several county or consolidated local government officers in all matters concerning any county or consolidated local government business within their jurisdiction..." KRS 69.210(3).
>
> Finally, **"[i]n no case shall the county attorney take a fee or act as counsel in any case in opposition to the interest of the county or consolidated local government."** *Id.*, (bold lettering added).

The interpretation of KRS 186.574(6) urged by Appellee requires the county attorney to choose whether to allow the traffic violator to participate in a program which generates a fee for the county attorney at the expense of the county, or alternatively, to go through the traditional court process, whereby the county will receive a distribution to defray the expenses of the sheriff's office and the jail. Should the county attorney choose the former option, then the county attorney is taking a "fee...in opposition to the interest of the county," which is prohibited by statute.

The county attorney is also placed into an ethical conflict under the Kentucky Rules of Professional Conduct, SCR 3.130(1.7(a)(2)) "Conflict of interest: current clients." Under that rule, a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer." While it is an open question whether a fee which goes to the constitutional office of the county attorney and not the county attorney himself benefits a "personal interest of the lawyer," the fact remains that the county attorney must choose between taking an action which benefits his constitutional office at the expense of the county he represents, or which benefits the county government at the expense of his own office.

This is not a speculative conflict. It should be noted that the Kentucky County Attorneys Association Inc. has filed an *Amicus* brief on behalf of the Appellee in this case, while the Kentucky Sheriff's Association and the Kentucky County Judge/Executive Association are among the *Amici* who filed a brief on behalf of the Appellant in this case.

CONCLUSION

Amici Curiae respectfully request this Court to vacate the order of the Jefferson Circuit Court, Division 9, and reinstate the original Opinion and Order of the Jefferson District Court, Division 2.

Respectfully submitted,

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